

## Internal Revenue Service

Department of the Treasury

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Person to Contact:

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### Legend:

Purchaser            =

Disregarded Sub    =

Sellers                =

Target                =

Target Affiliates    =

US Sub =

Country X =

Date A =

Date B =

Date C =

Date X =

Date Y =

Date Z =

X Taxable Year =

Purchaser's  
Company Officials =

Outside Tax  
Professional =

Authorized  
Representatives =

Business A =

Dear \_\_\_\_\_ :

This responds to your Authorized Representatives' October 22, 1998 letter requesting an extension of time, under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations, for Purchaser to make late elections. Purchaser (as the deemed purchasing corporation, the common parent of the consolidated group, and the United States shareholder of the controlled foreign corporations making deemed purchases) is requesting an extension to make "section 338 elections" under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations, with respect to the acquisition of the stock of Target and deemed acquisitions of the stock of the Target Affiliates (sometimes hereinafter such elections are collectively referred to as the "Election" or "Elections") on Date A. Additional information was received in letters dated February 3 and 16, March 19, and April 26, 1999. The material information is summarized below.

Purchaser is a publically traded corporation that is the common parent of a consolidated group, has a calendar taxable year and uses the accrual method of accounting. Disregarded Sub is a Country X corporation (the specific country of incorporation is set forth above in the redacted legend) that, prior to the subject acquisition and on or before Date Y, was newly formed by Purchaser as a wholly owned subsidiary to acquire the stock of Target. Target is a Country X corporation (the specific country of incorporation is set forth above in the redacted legend) that was wholly owned by Sellers (individuals and trusts who are citizens and residents of Country X, except as set forth in the above redacted legend). Target Affiliates are foreign corporations (the specific countries of incorporation are set forth above in the redacted legend) that are direct wholly owned subsidiaries of Target; and U.S. Sub is a wholly owned domestic subsidiary of Target. Purchaser and Target and their subsidiaries are engaged in Business A.

Prior to the below described acquisition, Sellers (except for the domestic shareholders, which are set forth above in the redacted legend) and Target (including Target Affiliates) did not file U.S. income tax returns and they were not subject to U.S. income taxation (except that Target did file a United States Income Tax Return for U.S. Sub, its only domestic subsidiary, which is further discussed below). Further, neither Target nor any of the Target Affiliates (except for U.S. Sub, Target's only domestic subsidiary, which is further discussed below) was: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) required, under § 1.6012-2(g), to file a U.S. income tax return.

On Date A, Purchaser, Disregarded Sub, Target and Sellers entered into a Stock Purchase Agreement for Disregarded Sub to acquire all of Sellers' Target stock (including

the stock of the Target Affiliates, and certain other subsidiaries for which a § 338 election has not and will not be made). Also on Date A, Disregarded Sub acquired all of the Sellers' Target stock (including the stock of the Target Affiliates, and certain other subsidiaries for which a § 338 election has not and will not be made), pursuant to the Stock Purchase Agreement, solely in exchange for cash and the assumption of Target's liabilities, in a fully taxable transaction. It is represented that (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3), and (2) Purchaser's deemed acquisition of the stock of Target and Target Affiliates qualified as a "qualified stock purchase," as defined in § 338(d)(3). The period of limitations on assessments under § 6501(a) has not expired for Purchaser's or Target's (and its subsidiaries') taxable year(s) in which the acquisition occurred, the taxable years in which the Elections should have been filed, or any taxable years that would have been affected by the Elections had they been timely filed.

On Date X Disregarded Sub made an election, that was timely filed, under § 301.7701-3 (by filing Form 8832, Entity Classification Election) to disregard Disregarded Sub as a separate entity for United States tax purposes, effective on Date Y (which is before the subject acquisition). Also, on Date Z (which is after the acquisition, but before the due date of the Elections) Target distributed all of the stock of U.S. Sub to Purchaser. We have been informed that the distribution was not reported on Purchaser's tax return. Purchaser viewed the distribution as a return of capital, since after the subject acquisition, and by reason of the intended Election, target had no earnings and profits.

The Elections were due on Date B. However, for various reasons the Elections were not filed. On Date C (which is after the due date for the Elections), Purchaser's Company Officials, Outside Tax Professional and Authorized Representatives discovered that the Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

Section 338(a) permits certain stock purchases to be treated as asset purchases if the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and the acquisition is a "qualified stock purchase." Section 338(d)(3) defines a "qualified stock purchase" as any transaction or series of transactions in which stock (meeting the requirements of § 1504(a)(2)) of one corporation is acquired by another corporation by purchase during the 12 month acquisition period.

Sections 1.338-1(g)(1)(i) and (v) provide, inter alia, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (*i.e.*, which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is considered subject to United States tax (*e.g.*, is a CFC or is required to file a United States income tax return). Section 338(h)(3)(A)(iii) provides that the term "purchase" means any acquisition of stock, but only if (1) the basis of the stock in the hands of the purchasing corporation is not determined in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or under § 1014(a)

(relating to property acquired from a decedent); (2) the stock is not acquired in an exchange to which § 351, 354, 355, or 356 applies and is not acquired in any other transaction described in regulations in which the transferor does not recognize the entire amount of the gain or loss realized on the transaction; and (3) the stock is not acquired from a person the ownership of whose stock would, under § 318(a), be attributed to the person acquiring such stock.

Section 1.338-1(d) provides that a purchasing corporation makes a "section 338 election" for target by filing a statement of "section 338 election" on Form 8023 or Form 8023-A in accordance with the instructions on the form. The "section 338 election" must be filed not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. A "section 338 election" is irrevocable.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is not required under § 1.6012-2(g) (other than § 1.6012-2(g)(2)(i)(b)(2)) to file a United States income tax return for its taxable year that includes the acquisition date. Form 8023-A or Form 8023 must be filed as described in the form and its instructions, and also must be attached to Form 5471 (information return with respect to foreign corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

Section 1.338-1(c)(14) provides that the term target affiliate has the same meaning as in § 338(h)(6) (applied without § 338(h)(6)(B)(i)). Thus, a corporation described in § 338(h)(6)(B)(i) is considered a target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target. Section 1.338-2(b)(4) provides that if an election under § 338 is made for target, old target is deemed to sell target's assets and new target is deemed to acquire those assets. Under § 338(h)(3)(B), new target's deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets.

Section 1.1502-77(a) provides that the common parent, for all purposes (other than for several purposes not relevant here), shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability of the consolidated return year. See also Form 8023-A and the instructions thereto.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

- (1) The taxpayer acted reasonably and in good faith, and,
- (2) Granting relief will not prejudice the interests of the government.

Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement. Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

In this case, the time for filing the Elections was fixed by the regulations (i.e., § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser to file the Elections, provided Purchaser shows it acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Company Officials, Outside Tax Professional and Authorized Representatives explain the circumstances that resulted in the failure to file the Elections. The information establishes that tax professionals were responsible for the Elections, that Purchaser relied on the tax professionals to timely make the Elections, and that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Purchaser acted reasonably and in good faith in failing to timely file the Elections, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Purchaser (as the deemed purchasing corporation, the common parent of the consolidated group, and the United States shareholder of the controlled foreign corporations making deemed purchases) to file the Elections with respect to the acquisition of the stock of Target and deemed acquisitions of the stock of the Target Affiliates, as described above.

The above extension of time is conditioned on: (1) the taxpayer not altering a return position for which an accuracy-related penalty could be imposed under § 6662 (see § 301.9100-3(b)(3)(i), and example 3 of § 301.9100-3(f)); and (2), the taxpayers' (Purchaser's and its subsidiaries', Target's, Target Affiliates', U.S. Sub's, Target's other subsidiaries (all other subsidiaries of Target, basically those for which § 338 elections have not and will not be made) and Seller's (to the extent they have any U.S. tax liability)) tax liability being not lower, in the aggregate for all years to which the Elections apply, than it would have been if the Elections had been timely made (taking into account the time value of money). No opinion is expressed as to the taxpayers' tax liability for the years involved. A determination thereof will be made by the District Director's office upon audit of the federal income tax returns involved. Further, no opinion is expressed as to the federal income tax effect, if any, if it is determined that the taxpayers' liability is lower. Section 301.9100-3(c).

Purchaser should file the Elections in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, a new election on Form 8023-A or Form 8023 must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions on the election form. A copy of this letter should be attached to the election form. Purchaser must amend its applicable return(s) (and Target and Target Affiliates must file a final return(s), if and as applicable) to report the acquisition/sale (and deemed acquisitions/sales) as "section 338 transactions," and attach thereto a copy of this letter and a copy of the election form (also see §§ 1.338-1(g) and 1.338-5). That is, the "old" applicable targets must file separate final returns (if and as applicable) and the "new" applicable targets must be included in Purchaser's return (by being listed on Form 5471, information return with respect to a foreign corporation) for the first year following the acquisitions. See, §§ 1.338-1(e) and 1.338-1(g), and Announcement 98-2, 1998-2 I.R.B. 38. Also, a single Form 8023-A or Form 8023 may be used, and the Target Affiliates should be listed on an attachment thereto (see § 1.338-1(e)(4) and the instructions to the form).

No opinion is expressed as to: (1) whether the acquisition of the stock of Target and/or the deemed acquisition of the stocks of the Target Affiliates qualifies as a "qualified stock purchase"; (2) whether the acquisition of stock of Target and/or the deemed acquisition of the stocks of the Target Affiliates qualifies for § 338(a) treatment; (3) if the acquisition of stock of Target and/or the deemed acquisition of the stocks of the Target Affiliates qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by such targets on the deemed asset sales; (4) as to the tax consequences of Target's distribution of its U.S. Sub to Purchaser; or (5) whether § 301.9100-3(b)(3)(i) applies to deny relief.

In addition, no opinion is expressed as to the tax effects or consequences of filing the Elections late under the provisions of any other section of the Code and regulations, or as to the tax treatment of any conditions existing at the time of, or resulting from, filing the Elections late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-1, we relied on certain statements and representations

made by the taxpayer, its employees and representatives. However, the District Director should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the election, penalties and interest that would otherwise be applicable, if any, continue to apply.

A copy of this letter is being sent to the authorized representative designated on your power of attorney.

This letter is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by \_\_\_\_\_  
Richard Todd  
Counsel to the Assistant  
Chief Counsel (Corporate)